

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JUNE 12 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

JUNIES A. JENKINS,

Plaintiff/Appellant,

v.

BARBARA ULIBARRI; STATE OF  
ARIZONA; DEPARTMENT OF  
CORRECTIONS; V. RUBOYIANES;  
SGT. NICHOLS; CPT. M. COOK;  
LT. T. CRINKAW; DARYL JOHNSON;  
and TERRY HERNANDEZ,

Defendants/Appellees.

2 CA-CV 2007-0099  
DEPARTMENT B

MEMORANDUM DECISION

Not for Publication  
Rule 28, Rules of Civil  
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV0200601071

Honorable Kevin D. White, Judge

AFFIRMED

Junies A. Jenkins

Florence  
In Propria Persona

V Á S Q U E Z, Judge.

¶1 In this civil rights action, appellant Junies A. Jenkins appeals from the trial court's dismissal of his complaint for failure to timely serve the defendants. Finding no error, we affirm.

### **Facts and Procedural Background**

¶2 We view the record in the light most favorable to the party against whom judgment was entered. *Corbett v. ManorCare of Am., Inc.*, 213 Ariz. 618, ¶ 2, 146 P.3d 1027, 1030-31 (App. 2006). On July 3, 2006, Jenkins, a prison inmate in the Arizona Department of Corrections (ADOC), filed a pro se complaint in Pinal County Superior Court alleging his constitutional rights had been violated under 42 U.S.C. §§ 1983, 1985, and 1997. His claims arose from a series of events in which he alleges ADOC employees conspired to deny him access to the courts, refused to make copies of legal papers, retaliated against him for exercising a constitutionally protected right, denied him due process in prison disciplinary proceedings, and acted with deliberate indifference when he had requested assistance in his legal matters. His complaint listed a total of nine defendants: eight individuals who apparently were prison staff or other employees of ADOC and the "State of Arizona, Department of Correction."<sup>1</sup> On September 1, 2006, Jenkins filed a signed notice of service indicating that on August 3 he had mailed copies of his complaint and a

---

<sup>1</sup>Although it is not clear from the complaint whether Jenkins intended to name both the State of Arizona and the Arizona Department of Corrections as defendants, it appears from subsequent motions this was his intention. We also note that Jenkins subsequently dismissed one of the individual defendants, CO II Britton, #9032, from the action, citing the defendant's "moral character."

summons to all nine defendants, and on August 8 he had also mailed copies to “Micheal Brodsky,” an assistant attorney general with the Arizona Attorney General’s office.<sup>2</sup>

¶3 On November 21, 2006, Jenkins filed a certificate of readiness and motion to set. On December 18, the trial court denied Jenkins’s motion to set stating, “Plaintiff has not filed proper proof of service on the named Defendants as required by the Arizona Rules of Civil Procedure.” On January 10, 2007, Jenkins simultaneously filed multiple motions for summary judgment against all of the defendants and notices of default against the State, ADOC, Victor Ruboyianes and Sgt. Nichols. On March 19, the court declined to rule on these motions, finding them premature because Jenkins had still failed to provide proof of proper service on any of the defendants.

¶4 The court noted that the time for serving the defendants pursuant to Rule 4(i), Ariz. R. Civ. P., had expired. It nevertheless extended the deadline for Jenkins to complete service to April 30, 2007, and admonished him that failure to serve the defendants by that date would result in dismissal of the lawsuit. Jenkins responded with a “Notice of Appeal, Petition for Special Action Review, and Petition for Emergency Temporary Restraining Order,” in which he argued his notice of service was sufficient proof the defendants had been properly served. The court then found Jenkins still had not provided proof of proper service and entered an order dismissing the case on May 29, 2007. This appeal followed and,

---

<sup>2</sup>It appears that at least some of the defendants were only sent a copy of the summons, because Jenkins “sent the Defendant Copies [of the complaint] to [Brodsky], by mistake.” There is also an inconsistency with regard to dates; Jenkins states elsewhere that copies were mailed to the defendants on August 8, rather than August 3.

because none of the putative defendants appeared in the proceedings below, Jenkins is the sole party to the appeal.<sup>3</sup>

## Discussion

### Jurisdiction

¶5 As a preliminary matter, we note that Jenkins alleges his civil rights were violated in March or April 2005, July 2005, and January 2006; the trial court dismissed the lawsuit on May 29, 2007. The court's order did not specify whether the dismissal was with or without prejudice. Under Rule 4(i), Ariz. R. Civ. P., however, if the plaintiff fails to complete service on a defendant within 120 days after filing the complaint, the court "shall dismiss the action without prejudice." Thus, we presume the dismissal in this case was without prejudice. *See also Grobe v. McBryde*, 105 Ariz. 577, 579, 468 P.2d 936, 938 (1970) (where cause of action dismissed for failure to timely serve defendant, dismissal is without prejudice).

¶6 Generally a dismissal without prejudice is not an appealable order, and we would therefore normally lack jurisdiction to consider Jenkins's claims on appeal. *See L.B. Nelson Corp. of Tucson v. W. Am. Fin. Corp.*, 150 Ariz. 211, 217, 722 P.2d 379, 385 (App. 1986). However, the plaintiff may not refile the complaint if the statute of limitations has

---

<sup>3</sup>In his opening brief, Jenkins indicates he is also appealing from the trial court's decision in Pinal County Superior Court case number CV-2006-00398, and much of his argument centers on issues arising in that case. We note he has already filed an appeal in CV-2006-00398, and any issues relating to that case were addressed in our decision in that appeal. *Jenkins v. Sedillo*, No. 2 CA-CV 2006-0229 (memorandum decision filed June 13, 2007). Therefore, we only address the issues relating to CV-2006-001071.

expired, *Maier v. Urman*, 211 Ariz. 543, ¶ 20, 124 P.3d 770, 777 (App. 2005), and in Arizona, there is a two-year statute of limitations for federal civil rights claims, A.R.S. § 12-542 (two-year statute of limitations in tort actions). *See Wallace v. Kato*, \_\_\_ U.S. \_\_\_, \_\_\_, 127 S. Ct. 1091, 1094 (2007) (limitations period for § 1983 actions “is that which the [s]tate provides for personal-injury torts”).

¶7 Therefore, even though dismissed without prejudice, Jenkins could not have refiled those claims that accrued prior to May 2005 because they were time barred (conspiracy to deny him access to the courts and denial of due process in prison disciplinary proceedings). Consequently, we have jurisdiction to consider them on appeal.<sup>4</sup> *See Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 208 Ariz. 176, ¶ 13, 91 P.3d 1019, 1023 (App. 2004), *citing State v. Boehringer*, 16 Ariz. 48, 51-52, 141 P. 126, 127 (1914) (dismissal without prejudice appealable when it “in effect determines . . . action and prevents final judgment from which . . . appeal might be taken”); *see also Flynn v. Johnson*, 3 Ariz. App. 369, 373, 414 P.2d 757, 761 (App. 1966) (where complaint could be amended, dismissal not appealable; had court precluded amendment, dismissal would have been appealable).

---

<sup>4</sup>Jenkins did not seek to refile the claims that accrued before May 2005 under Arizona’s savings statute, A.R.S. § 12-504. Under that statute, the trial court has discretion to allow the plaintiff to refile his claim within six months from the date the action was “terminated by abatement . . . or dismissal for lack of prosecution.” § 12-504(A); *see also Schwartz v. Ariz. Primary Care Physicians*, 192 Ariz. 290, ¶ 14, 964 P.2d 491, 495 (App. 1998).

¶8 Jenkins’s remaining claims, based on violations that allegedly occurred after May 2005, were still viable and could have been refiled after the complaint was dismissed because the limitations period had not yet lapsed. However, because all of his claims were dismissed on the same ground and in order to avoid unnecessary piecemeal litigation, in our discretion we consider those claims. *See Knauss v. DND Neffson Co.*, 192 Ariz. 192, 199, 963 P.2d 271, 278 (App. 1997) (addressing cross-appeal, despite interlocutory nature, because issue timely raised, litigated, ruled on by trial court, affected final judgment, and involved purely legal question); *Hydroculture, Inc. v. Coopers & Lybrand*, 174 Ariz. 277, 284, 848 P.2d 856, 863 (App. 1992) (when appellate court has appellate jurisdiction over cause of action, it can review all orders and rulings assigned as error); *State Farm Mut. Auto. Ins. Co. v. Peaton*, 168 Ariz. 184, 194, 812 P.2d 1002, 1012 (App. 1990) (“To refuse to consider this issue would be to foster piecemeal litigation, not prevent it.”).

### **Dismissal for Failure to Timely Serve**

¶9 To the extent we understand Jenkins’s convoluted argument on appeal, he appears to contend the trial court erred in dismissing his case because either: 1) he completed service on the defendants through ADOC’s “very reliable” internal letter system for staff-inmate communications under ADOC Department Order #916, *see* ADOC Policies, [http://www.azcorrections.gov/adc/policy/dept\\_orders.asp](http://www.azcorrections.gov/adc/policy/dept_orders.asp) (last visited June 10, 2008); or, 2) the defendants failed to respond to Jenkins’s request for waiver of service, as required by the Department Order, and therefore he was not required to do anything further to complete service. We review a trial court’s decision to dismiss a complaint for failure to properly

serve a defendant for an abuse of discretion. *Corbett*, 213 Ariz. 618, ¶ 2, 146 P.3d at 1030-31.

¶10 “Proper service of process is essential for the court to have jurisdiction over the defendant.” *Koven v. Saberdyne Sys., Inc.*, 128 Ariz. 318, 321, 625 P.2d 907, 910 (App. 1980). Service is generally accomplished by having “a sheriff, a sheriff’s deputy, a private process server registered with the clerk of the court . . . or any other person specially appointed by the court” deliver a copy of the summons and of the complaint to the defendant personally or to some other person as specified in the rules. Ariz. R. Civ. P. 4(d).

¶11 However, service may be accomplished by alternative means. For example, Rule 4.1(c), Ariz. R. Civ. P., provides a plaintiff may notify a defendant of the filing of a complaint and request that the defendant waive service of the summons and complaint. *See State v. Zaman*, 194 Ariz. 442, ¶ 19, 984 P.2d 528, 531 (1999) (Jones, J., concurring) (procurement of waiver alternative to service by sheriff or private process server). “When a party uses the mail, however, service must be completed by the serving party in accordance with the rule, including receipt and filing of the acknowledgment signed under oath or affirmation by the person served.” *Postal Instant Press, Inc. v. Corral Restaurants, Inc.*, 187 Ariz. 487, 488, 930 P.2d 1001, 1002 (1997). And “service is not *complete* until the acknowledgment of receipt is executed . . . even if there is evidence that the summons and complaint were received.” *Tonner v. Paradise Valley Magis. Ct.*, 171 Ariz. 449, 450-51, 831 P.2d 448, 449-50 (App. 1992) (citation omitted).

¶12 Moreover, if service is not made upon a defendant within 120 days after the filing of the complaint, “the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time.” Ariz. R. Civ. P. 4(i); *see Corbett*, 213 Ariz. 618, ¶ 8, 146 P.3d at 1032.

¶13 Jenkins filed his complaint on July 3, 2006. On August 8, 2006, he mailed a copy of the summons and complaint by first class mail to Michael Brodsky at the Arizona Attorney General’s office, apparently believing Brodsky was the appropriate person to serve for an action filed against the State of Arizona and the ADOC.<sup>5</sup> On or around the same date, he also sent copies of the summons and complaint, via ADOC’s internal letter system, to ADOC’s Phoenix office and the eight individual defendants, apparently all employees of ADOC.

¶14 Jenkins argued below that his mailing of the summons and complaint to the defendants at their places of employment constituted delivery to their “usual place of abode” for purposes of Rule 4.1(d) and thus constituted effective service.<sup>6</sup> On appeal, he

---

<sup>5</sup>Because we conclude Jenkins’s actions did not constitute proper service, we do not consider whether service on Brodsky would have satisfied the requirements of Rule 4.1(h) and (j), Ariz. R. Civ. P., which provides that the attorney general must be served for suits against the state and “the appropriate legal officer” must be served for lawsuits against governmental entities such as the Arizona Department of Corrections.

<sup>6</sup>We note such mailing would not constitute “delivery” pursuant to this rule and that a place of employment is not considered a “usual place of abode.” *See Melton v. Superior Court*, 154 Ariz. 40, 42, 739 P.2d 1357, 1359 (App. 1987) (leaving copies of summons and complaint at place of employment invalid even though defendant received actual notice).

acknowledges that his mailing of the summons and complaint constituted a request for a waiver of service. However, he argues that under ADOC Department Order #916 the individual defendants were required to acknowledge his request because “a Request For Waiver of Service of Summons constitute[s] a direct question to the staff member . . . [w]hich . . . requires a written response.” But Jenkins cites no authority in support of his apparent contention that the court should have found the defendants constructively had acknowledged his request for waiver as a result of this alleged violation of ADOC regulations. And, he concedes he failed to enclose two copies of the request for waiver, as Rule 4.1(c)(2)(G) requires, contending that this failure was the result of having been denied access to photocopying facilities for legal purposes, the basis of one of his underlying claims.

¶15 In any event, none of the defendants complied with Jenkins’s request for a waiver, constructively or otherwise. Even assuming ADOC’s internal letter system is “very reliable,” as Jenkins suggests, at best this only establishes the defendants received the requests for waiver of service. It does not constitute the final step necessary for completion of service under Rule 4.1(c)—his “receipt and filing of the acknowledgment signed under oath or affirmation by the person served.”<sup>7</sup> *Postal Instant Press, Inc.*, 187 Ariz. at 488, 930 P.2d at 1002. It appears that below Jenkins acknowledged he could have “resort[ed]” to hiring a process server to effect service on the defendants. However, in response to the

---

<sup>7</sup>We note Jenkins’s mailings were improper under Department Order #916. “Inmates who have questions or problems that require written responses from Department staff shall use the Inmate Letter Form.” D.O. #916.03.1.1. And, “written contents shall be limited to the space provided on the form. No attachments shall be accepted.” D.O. #916.0.3.1.2.

court's admonition to file proof of service or face dismissal of his claims, Jenkins objected that this would have cost each defendant a "\$16.00 service fee, plus mileage and other costs." Although the court explicitly gave Jenkins a six-week extension of time to properly serve the defendants, he failed to do so. *See Cooper v. Holder*, 24 Ariz. 415, 419, 210 P. 690, 691 (1922) ("parties to litigation may, by their voluntary act, deprive themselves of the benefit of any rule of law, except when the interests of the public might suffer thereby"). The 120-day period within which a defendant must be served, *see* Rule 4(i), Ariz. R. Civ. P., had expired in November 2006, but the court did not dismiss the case until the end of May 2007. We therefore conclude that the trial court did not abuse its discretion in dismissing Jenkins's complaint for failure to effectively serve the defendants.

### **Disposition**

¶16 For the reasons stated above, we affirm.

---

GARYE L. VÁSQUEZ, Judge

CONCURRING:

---

PHILIP G. ESPINOSA, Judge

---

JOSEPH W. HOWARD, Judge